ANSWERS

FOR

ROBERT KERR in *Garlarg*, *John Brown* in *Craigencallie*, *John Maclurg* in *Glenſballoch*, and *John Maclurg* younger in *Auchinlick*, Truſtees for the Creditors of *Anthony Maclurg*, late in *Craignell*;

TO THE

PETITION of *James Mackell* in *Trochiehouſe*.

ANTHONY MACLURG tenant in *Craignell*, failed in his circumſtances towards the end of 1762, and his creditors, of moſt of them, had a meeting in *December* that year, at which they granted him a *ſuperſedere*; and being ſenſible it would be deſtructive to them all, to tear his effects by diligence, with unanimous conſent, they accepted of his tack, ſtock and other effects, and made choice of the reſpondents, four *farmers* of character in the neighbourhood, to be their truſtees, for managing and diſpoſing of his ſubjects for their joint behoof; and *Maclurg* the debtor, granted them a miſſive reciting the agreement, obliging himſelf to execute a diſpoſition of his whole effects to theſe truſtees. Dec. 15. 1762.

The agreement, election and *ſuperſedere*, ſigned by no fewer than 26 ſubſcribers, being all the creditors of *Maclurg*, is produced, with the letter granted by *Maclurg* himſelf;

ſelf; and the meaſure appeared ſo equitable in itſelf, as well as beneficial to all concerned, that two or three creditors, who had *parata executio*, and could have inſtantly *poinded*, agreed to abſtain from putting their diligence in execution; the other creditors, it is true, agreed to allow them a preference. But the petitioner has no juſt cauſe of complaint on that account: On the contrary, the meaſure was moſt reaſonable in itſelf, as well as profitable to all; becauſe the landlord, who was one of the creditors, was at any rate ſecure on his hypotheck; the whole debts agreed to be preferred, did not exceed 23 *l.* and, by prevailing on theſe creditors to abſtain from poinding, not only was a load of expence prevented from being heaped on the ſubjects, but the effects themſelves were hindred from being all directly carried off by theſe and other creditors much more forward in diligence than the petitioner, who had done none, and has therefore greatly profited by the tranſaction.

The petitioner perſiſting in a miſtake, frequently corrected before the Lord Ordinary, complains, that two of the truſtees are the father and brother of the common debtor, and that one of the debts to which a preference is given, is due to *John Maclurg* in *Glenſhalloch*, *Anthony*'s father; but he is miſtaken in both particulars: *John Maclurg* in *Glenſhalloch* is a different perſon from the father of the bankrupt; and as the creditors choſe the truſtees, if the fact had been true, no juſt exception could have been taken on that account, becauſe they were certainly the beſt judges of the moſt proper perſons for managing the effects.

The truſtees, directly after the agreement was concluded, entered on the management and into poſſeſſion; and *Maclurg*, for further compleating their right in implement of his miſſive, afterwards granted a diſpoſition of all his effects, particularly of his tack of *Craignell*, with the crop and

Feb. 8. 1763.

and ſtock on the gronnds, to the reſpondents, as truſtees for themſelves and his other creditors; and among the reſt, for behoof of *James Mackell*, the petitioner *nominatim*, therein ſaid to be creditor to *Maclurg*, by a bill dated 23d *December* 1759, for 51 *l. Sterling*.

The farm the truſtees ſubſet without delay to *Andrew Maclamaroch*, to whom they did alſo, of this date, ſell the ſtocking on the ground, for a price then agreed, by a writing ſigned by both parties, to be fixed by arbiters, alſo choſen between him and them. Mar. 17. 1753.

Maclamaroch, in virtue of the ſub-ſet, entered into poſſeſſion, and the ſtock was regularly delivered over to him upon the 31ſt of *May*.

The petitioner knowing, that thoſe who had *parata executio*, as well as the other creditors, had generouſly conſented not to proceed in diligence againſt the effects, formed a ſcheme of reaping an advantage from this circumſtance; and as he happened not to be bound by writ to accede to the truſt, tho' he had frequently met with the creditors, he determined to take ſeparate meaſures: In this view he kept quiet till the very day that the ſtock was delivered over to *Maclamaroch*, *then* clapt an arreſtment into his hands for the foreſaid debt, on a precept which he had privately taken out, *only the day before*, from the Stewart of *Kirkcudbright*; and having obtained a decreet in abſence againſt *Maclurg* the common debtor for the debt, with 10 *l. Sterling* of expences, he afterwards brought his action of furthcoming before the ſame court.

It is ſaid in the petition, that *Maclamaroch* acted all along in concert with the truſtees; but the contrary is rather the fact, and he appears from the procedure to have greatly favoured the petitioner, with whom he is much connected; in this view he allowed decreet in abſence to be pronounced againſt him in the furthcoming before the Stewart, and he has even acknowledged upon oath, that

that he went the length of refuſing to allow a ſuſpenſion to be raiſed in *in his name*, till he got a letter from two of the truſtees to relieve him of the effect of the proceſs; a circumſtance mentioned in the petition to ſhow he was in concert with the truſtees, but which does truly prove directly the reverſe.

In the ſuſpenſion and multiple-poinding which came to be diſcuſt before the Lord *Kaims*, he did, in like manner, many times fail to depone in the furthcoming, by which means the decreet already obtained by the petitioner was in danger of being *ſimpliciter* affirmed, and the truſtees were put to much unneceſſary expence, as they were obliged to prefer many repreſentations to the Lord Ordinary, praying always to be reponed againſt the interlocutors his Lordſhip was neceſſitated to pronounce on account of the tergiverſation of *Maclamaroch*, as well as to have a further term aſſigned him for deponing.

At laſt, however, after many delays, he appeared on the 22d of *June* 1765, and emitted the depoſition recited in the petition, in ſubſtance importing, "That he had pur-" chaſed the ſtocking on *Craignell* from the reſpondents, " the truſtees of *Anthony Maclurg*, and that the price, which " had, by the bargain, been referred to arbiters, was af-" terwards fixed by them at about 175 *l. ſterling*."

And the Lord Ordinary having adviſed the oath, on memorials, repreſentation and anſwers, pronounced the interlocutors againſt which the petition reclaims.

The principal ground on which the petitioner ſeems to hope for an alteration of the interlocutor, is, 1*mo*, A general objection which he makes to truſt rights: To which he adds, 2*do*, That the ſtocking was not ſold by the truſtees, or purchaſed from them, but was truly ſold by *Maclurg* and purchaſed from him. But it will not be difficult to ſhow his argument is inconcluſive on both points.

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On the *firſt*, it may be premiſed in the general, That the queſtion before your Lordſhips reſolves into this, whether the truſtees, who ſold the ſtocking to *Maclamaroch*, are preferable for the price *ad hunc effectum*, that it may be divided among *all Maclurg*'s creditors, in *equal* proportions effeiring to their debts? or *Mackell*, the petitioner, who, as a creditor of *Maclurg*, arreſted the price, is entitled to draw payment of his *whole* debt *preferably* to the other creditors?

And as it is certainly moſt agreeable to *juſtice*, that in every caſe, in which a debtor's effects come ſhort, each creditor ſhould draw in proportion to the extent of his debt only; ſo the reſpondents are hopeful your Lordſhips will ſee no ground in *law* for giving the preference now demanded to this arreſting creditor, but that he muſt be ſatisfied with drawing his proportion along with the reſt.

The petitioner would inſinuate, that *Maclurg* had become *notour bankrupt*, and that ultimate diligence had been done againſt him; but your Lordſhips will be informed, 1*mo*, That is by no means the fact, he is, it is true, inſolvent, but *notour bankrupt*, in terms of the ſtatute 1696, he neither was at the date of the truſt diſpoſition or ſale, nor is he at this day.

It is material to obſerve, 2*do*, That the petitioner had not taken the leaſt ſtep of diligence againſt the common debtor at the time the diſpoſition was granted: His action for payment he brought, and he laid on his arreſtment *only* in the end of *May* 1763, *long before* which time the ſubjects were not only veſted in the reſpondents by the original agreement, concluded 15th *December* 1762, and ſubſequent diſpoſition executed, purſuant thereto, on the 8th of *February* 1763, but they had alſo attained full poſſeſſion, and ſold the ſtocking to *Maclamaroch* the arreſtee.

This being the caſe, the grounds are not eaſy to be conceived, on which the prayer of the petition can be granted, or the petitioner be preferred to the reſpondents. The com-

mon debitor was effectually *denuded* of the ſubjects long *before* the arreſtment was laid on, the ſubjects were fully veſted in the truſtees for behoof of the creditors; and therefore, unleſs there be ſome ground in law on which the petitioner can *ſet aſide* the diſpoſition, his arreſtment can never carry effects of which the debitor was abſolutely *denuded* long before it was uſed.

The petitioner pretends truſt diſpoſitions are now ſettled to be null in *all* caſes, without any exception; but the reſpondents diſpute the principle, and they cannot, with ſubmiſſion, diſcover the preſent diſpoſition to be liable to *any* challenge, *either* at *common* law, *or* on any of the *ſtatutes* made in that behalf.

At *common law*, total alienations, made to particular creditors, to the *prejudice* or excluſion of others, may perhaps be reducible as fraudulent; but there is not ſurely the ſmalleſt ground or colour for alledging any fraudulent intention in the preſent caſe, on the part either of the diſponer, or of the diſponees; nothing indeed can be ſuppoſed ſo much the reverſe of fraud as a deed calculated to do *equal* juſtice to all the creditors, and law as well as equity will interpoſe with all their power to ſupport ſuch deed.

As therefore no challenge lies againſt the preſent diſpoſition at *common law*, ſo it ſtands equally clear of the ſtatutes relative to this matter.

With reſpect to the ſtatute 1696, it is unneceſſary to trouble your Lordſhips with any words upon it, as the granter is not pretended to have fallen under the deſcription given in it, either at the date of the diſpoſition, or to fall under it even at this day.

And with reſpect to the act 1621, it is equally clear, the deed falls under neither of the clauſes of that ſtatute: The latter clauſe it cannot poſſibly fall under, becauſe the petitioner had not done *any* diligence, either at the time the diſpoſition was executed, or for ſome months after its date;

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and the firſt clauſe has not the moſt remote connection with it, the diſpoſition not being a *gratuitous* alienation in defraud of creditors, but an alienation for behoof of the whole creditors, particularly of the petitioner himſelf.

The deciſions, therefore, quoted in the petition, have nothing to do with the preſent queſtion, becauſe they were all pronounced in caſes well known to your Lordſhips, in which the debitors had actually become *notour bankrupt*, in terms of the ſtatute 1696: And it is a jeſt to pretend, that diſpoſitions granted by perſons inſolvent, to truſtees, for behoof of *all* their creditors, are reducible in *all* caſes without exception: That is a length which the court has never gone, much leſs have your Lordſhips ever found, that when a truſt has been executed, and the effects of a bankrupt ingathered by truſtees, or they have actually, as in the preſent caſe, been converted into money, one or two non-acceding creditors could affect this money in the hands of the truſtees, to the prejudice of the other creditors.

A perſon that is not a notour bankrupt, and whoſe creditors are not *in curſu*, can certainly deliver over part of his effects *in ſolutum* to this and the other creditor, provided they be valued at a full and adequate price.

Or, if a perſon inſolvent ſhould convert his whole effects into money, it cannot admit of a doubt, that he could give off to every creditor a ſum effeiring to his debt, and the payment would be effectual to thoſe who pleaſed to accept of it, nor could it be brought under challenge by any perſon whatever.

In like manner, if his whole effects conſiſted of bills, and he was not laid under the diſabilities impoſed either by the ſtatute 1696 or the ſtatute 1621 (which is the preſent caſe), there can be as little doubt that he could indorſe to each creditor a bill effeiring to his debt, nor could the indorſation be brought under challenge by any mortal: If ſo, where can be the doubt, that if, inſtead of delivering effects, giving

giving off money, or indorſing a bill to each of his creditors, he ſhould convey the *whole* to a truſtee for their behoof; that thoſe creditors who acceded to the truſt, would have a right and intereſt in the effects, money, or bills, which could as little be defeated by the granter or his other creditors, as if they had been *directly* made over to the creditors themſelves? And for the ſame reaſon, whatever be the nature of the ſubjects, thoſe of the creditors who pleaſe to accede to the truſt, do thereby acquire in the ſubjects a *right* and intereſt effering to their debts; which right being fully veſted, cannot be defeated, either by the granter himſelf, or by the after diligence of his creditors, becauſe he is abſolutely denuded.

Where a debtor veſts his ſubjects in truſtees for behoof of his creditors, but the creditors refuſe to accede to the deed, it might perhaps be ſafely admitted, that the creditors would not, in that caſe, be barred from affecting the ſubjects by diligence, becauſe the property muſt then remain with the granter; as the truſtees themſelves have no intereſt in the ſubjects, and the creditors refuſe to take any benefit by the deed, it muſt conſequently be ſtill competent to them to affect the ſubjects by legal diligence; but where the truſtees are originally choſen by the creditors, or where the creditors accede to, and approve of the truſt, the granter is thereby *denuded*, and the ſubjects are abſolutely veſted in the truſtees for behoof of the creditors, to whom therefore there is a *jus quæſitum* by the deed, of which neither the granter, nor any other perſon, can diſappoint them.

If, indeed, ſome of the creditors accede to the truſt, and others do not, it may perhaps be competent to thoſe that ſtand out, to uſe legal diligence againſt the ſubjects. But what the reſpondents do humbly contend is, that the diligence of ſuch creditors can never go farther than to affect the ſhare or intereſt intended for them by the deed; becauſe,

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ſo far by their refuſing to accede or take any benefit from the truſt, the property was not transferred, but remained with the diſponer, and was therefore affectable by his creditors: But with reſpect to the ſhares of the creditors who accede, as the property was *pro tanto* transferred, and veſted in the truſtees for their behoof, the right thereby acquired to them could not poſſibly be diſappointed by any ſubſequent act or deed made by the granter, who was ſo far denuded; and if ſo, it could as little be affected or defeated by the after diligence of any of his creditors.

Therefore, in the preſent caſe, as the whole creditors, except the petitioner, acceded to the truſt long before his arreſtment, they did thereby acquire in the ſubjects an indefeaſible intereſt effeiring to their debts; and their right, being already completed, could not be hurt by the poſterior diligence of this petitioner, as the granter was *ab ante* effectually denuded in their favour.

The petitioner indeed refuſing to take under the truſt, the ſhare effeiring to his debt muſt perhaps remain with the granter, and the truſtees muſt be accountable to him for it; and that being the caſe, his arreſtment may affect that ſhare, but farther it cannot go; and the reſpondents have no objection that he be allowed to draw it either on the truſt deed, or on his arreſtment, as he pleaſes.

The petitioner diſputes, 2*do*, That the ſtocking was purchaſed from the reſpondents: He ſays, the only evidence of the fact, is the oath of *Maclamaroch*, who acted in concert with the truſtees; and that it would rather appear, that the ſtocking was ſold by *Maclurg* himſelf; for that he was preſent at the bargain, and was deſired by the truſtees to wiſh *Maclamorach* luck of the bargain, which he did, by taking him by the hand; and that the bills were drawn payable to *Maclurg*.

But, with ſubmiſſion, this fact does by no means reſt on the evidence of *Maclamaroch* alone:—It appears from the o-

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riginal miſſive and agreement produced in proceſs, executed between the parties the 15th of *December* 1762, as well as from the ſubſequent diſpoſition executed purſuant thereto, the 8th of *February* 1763, that *Maclurg* was totally denuded long before the ſale; and, therefore, *res ipſa loquitur*, that the ſame behoved to be made by thoſe who ſtood in the right of the ſubject.

2*do*, The reference made for fixing the price, was ſigned by the truſtees and *Maclamaroch* only, and *Maclurg* the common debitor was no party to it, which is real evidence he was not the ſeller.

3*tio*, *Maclamaroch*'s oath, tho' ſingle, would alone be unqueſtionable evidence of the fact:—No ſuſpicions lie againſt him, that he would ſwear to the petitioner's prejudice, eſpecially, as it appears from the procedure, that if he took a ſide, it was the petitioner's; but be that as it will, this petitioner cannot object to his evidence, when he *muſt* have recourſe to his oath to found a furthcoming againſt him: The ſum in his hands is, and can only be aſcertained by his oath; therefore, the nature of the debt *muſt* be explained by it alſo;—he has expreſly deponed, "That he underſtood the bargain to be made with the truſtees, and that "*Maclurg* was no party to the tranſaction." Both parties agree that was the fact, and other evidence cannot poſſibly be required, than their joint acknowledgment concerning the affair, corroborated too by the real evidence already mentioned, ariſing from the prevous diſpoſition, and ſigned reference about the price, as well as by every circumſtance to which *Maclamaroch* depones: He ſwears, the *truſtees* ſent for him to purchaſe the ſtock;—*they* were preſent at the ſale;—*they* made and ſigned the reference concerning the price;—*they* came and deſired him to accept bills for the price, which he refuſed to do, not on pretence that he had bought the ſtock from *another*, but becauſe of the arreſtment;—*they* agreed to let 60 *l.* lie in his hands, which was more

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than ſufficient to purge the arreſtment; and, at their deſire, he granted bills for the remainder of the price.

Therefore, it is of no conſequence, that *Maclurg* happened to be preſent at the bargain, was deſired to wiſh the purchaſer luck of it, or drew the bills for the price; he was ſtill living in the neighbourhood, and curioſity would naturally lead him to be preſent at the diſpoſal of effects, in which he had once been materially intereſted; but the truſtees were the only perſons who acted, or took upon them on the occaſion; and it was not improper in them, both to deſire him to wiſh the purchaſer luck of the bargain, and to cauſe the bills to be drawn payable to him, that every queſtion might afterwards be prevented at his inſtance, concerning the propriety of their management: But *Maclurg* never got poſſeſſion of the bills; and, it is admitted, they were inſtantly indorſed to the truſtees, which is real evidence they were then underſtood, on all hands, to be the only perſons who ſold the goods, and to whom the price was payable.

There can therefore be no doubt that the ſtocking was purchaſed from the truſtees, that the purchaſer was debtor to them alone, and therefore the arreſtment uſed by the petitioner as *Maclurg*'s creditor, can carry nothing.

It is ſaid in the petition, it does not appear that the diſpoſition was ever intimated; or, that the truſtees ever obtained poſſeſſion upon it, or uplifted, or even affected the price in *Maclamorach*'s hands.

But with ſubmiſſion, intimation was not neceſſary to compleat their right, which was a diſpoſition of the *ſpecies mobilium*; and it does not occur to whom they poſſibly could have made an intimation.

And it is a miſtake to ſay they did not obtain poſſeſſion; for that was univerſally known to be in them from the time, the effects were firſt diſponed in their favours, 15th *December* 1762; and they exerciſed it by the ſtrongeſt acts;

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particularly, by ſelling the moveables themſelves, that had been diſponed to them.

Nor did they *need* to affect the price, as they were themſelves proprietors of the ſubjects ſold; and by the bargain itſelf, they had the only right to demand payment of it.

An objection is made to the diſpoſition, that one of the inſtrumentary witneſſes is *John Maclurg*, brother of the common debtor, who it is ſaid, had an intereſt in the deed, that barred him from being a witneſs to its execution.

But it is ſubmitted, whether any intereſt *Maclurg* had in this deed could diſable him from being a witneſs to it: He was poſſeſſed of legal diligence, and could have operated payment as well as any other; ſo the truſt right was of no advantage to him, but rather indeed a loſs, and was a meaſure at leaſt equally beneficial to the other creditors.

Secundo, The utmoſt length the objection could go, would be to cut down the deed ſo far as reſpected *John Maclurg's* own intereſt, which it has already been obſerved was little or none, and he was certainly a habile witneſs to ſupport it *quoad* the other creditors.

Tertio, The obligation, as founded on the ſtatute 1681, is not a nullity, but the deed might ſtill be rendred probative, by the acknowledgement of the party; and as the verity of his ſubſcription is not denied by the granter, that is ſufficient to ſupport the deed.

Quarto, The common debitor was under a previous obligation, by his obligatory miſſive, to grant the diſpoſition, and therefore ſuppoſing the ſubjects had been delivered over to the truſtees without granting it, the letter, in which they are all particularly named, would have all the effect of a diſpoſition.

And *Quinto*, As the truſt relates to moveable ſubjects, no writing was at all neceſſary to conſtitute it: Therefore, if the ſubjects had been delivered over on a verbal agreement, and the truſtees had actualy ſold them, the purchaſer was acountable

acountable to them alone, and they themſelves, being only acountable in terms of the agreement of parties, behoved conſequently to acount to the creditors effeiring to their reſpective debts.

The petitioner, indeed, in endeavouring to overhaul the diſpoſition, is aiming at a moſt undue advantage over the other creditors.

If he had objected, ſeverals, who were in much greater forwardneſs than he, could have operated their payment, and he who had *no* diligence, would have been entirely cut out: But he determined to lull the other creditors aſleep; and it is ſubmitted, whether he ought to profit by his addreſs, or h s ſilence ought to be conſtrued an acquieſcence in. and acceſſion to the joint meaſures propoſed and followed by all the reſt, upon which plan he will get a full ſhare of his debtor's effects, and that is all he ought in law or juſtice to draw.

It is true, the Lord Ordinary did not at firſt think the circumſtances ſtated by the reſpondents, ſufficient to infer an acceſſion againſt the petitioner; but that interlocutor was opened on a repreſentation; and were it material, they are perſwaded they could ſatisfy your Lordſhips, that the petitioner's conduct was moſt inſidious on the preſent occaſion. They have however no occaſion to enter upon that queſtion, as they are hopeful it will appear to your Lordſhi s, that the diſpoſition granted to the reſpondents, is not liable to any challenge either at law or in equity; and therefore, that the reſpondents muſt be preferred to the petitioner, as the effects atached by his arreſtment, did not at the time belong to *Maclurg* his debtor, who had been *long before* denuded in favour of the truſtees.

In reſpect whereof, &c.

GEO. WALLACE.